IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE CIVIL JURISDICTION

SECOND APPEAL NO. 633 OF 1988

Gafoor Babalal Gavandi .... Appellant
(Ori. Plaintiff)

V/s

Nalasaheb Daval Gavandi
(since deceased, through his heirs) & ors. .... Respondents
(Ori. Defendants)

Shri D.S. Sawant for the appellant.

Miss Namrata Waghole holding for T.S. Ingale for the respondents.

CORAM: P.V. KAKADE, J.
DATED : 29TH SEPT., 2004

P.C.:

1 Heard learned counsel for both parties. Perused the record.

2 This is an appeal preferred against the judgment and order dated 4.11.1987 passed by the District Judge, Sangli in Civil Suit No. 39 of 1982 reversing the judgment and order passed by the Civil Judge, Jath in Civil Suit No. 70 of 1975 decided on 29.9.1981, whereby the suit was decreed. The lower appellate Court reversed the finding and appeal was allowed and the suit was dismissed.

The plaintiff filed the suit for obtaining injunction restraining the defendants from obstructing him from taking the cave's water in

their open premises of his building. He had also prayed for injunction restraining the defendant from obstructing him plastering the back wall of his house from their premises. In short, it is the case of the plaintiff that the premises bearing C.T.S. No. 153 from village Kasabe-Jath belongs to him. On the West side of the said premises he has constructed two rooms and the other premises towards the East are vacant. The said premises are described in para 1 of the plaint. To the North of the said premises there are premises of Badsha Mohamad Gavandi. The premises of Gavandi bear C.S. No. 154. To the West of the premises of the plaintiff there are premises of the appellants-defendants, and their premises bear C.T.S. No. 155. Along with the plaint, the plaintiff has attached rough sketch showing the position of the respective properties. It is also submitted by the plaintiff that the cave's water from his building used to be fall in the open premises of the appellants-defendants. It is his further contention that he had Wahiwat to plaster the back wall of his building and also to repair it. He had Wahiwat through the open premises of the appellants-defendants. He is having his Wahiwat since long time. It is further averred that his building collapsed about 9 to 10 years prior to the filing of the suit, so he constructed his premises about three years prior to the filing of the suit. He then fixed Panhali to take the cave's water on the Western side of his premises. However, according to him, the appellants-defendants

removed the said Panhali as it was temporary arrangement. A police complaint was also filed and police did warrant but in vain. hence the suit filed to establish the inventory alleged against the defendants.

Defendants came with a case that no such Wahiwat or easementary right existed at any given time and, as such, the suit was not tenable under law. On such and other grounds, the suit was dismissed with costs.

3 The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff has proved his case in toto and consequently decreed the suit by order dated 29.9.1981 holding that the plaintiff had easementary right as alleged and, therefore, the defendant was restrained from obstructing the plaintiff and draining water through cave in open place belonging to the defendant and also to remove the stones and create a passage of 3 feet in width from Western wall of the plaintiff and at the length as equal to the Western wall of the plaintiff's house.

4 Being aggrieved by the said judgment and order, the appeal was carried to the District Court, Sangli. The learned District Judge, Sangli adjudicated the dispute on merits after hearing both parties and came to the conclusion that the learned Trial Judge had committed an error and consequently the appeal was allowed and

the suit was dismissed. Hence the present appeal.

5 The substantial question of law which was formulated at the time of admission of this appeal is to the effect that whether the plaintiff appellant has proved by cogent evidence the right of easement for going to the premises of the defendant for the purpose of repairs and plaster of the wall of his house situated in C. T. S. No. 153 and whether he had right to drain the water on the property of the defendant as alleged.

6 At the outset, it may be noted that the learned Trial Judge has taken into account the sale deed Exh.59 dated 6.3.1953 along with the evidence of both parties as well as the report of his note of inspection of the suit site before coming to the conclusion that such right did exist in favour of the plaintiff. Perusal of the judgment of the learned District Judge shows that he has refused to accept the evidence of sale deed Exh.59 merely on the ground that the defendants are not parties to the said sale deed and secondly even assuming that by the said sale deed the vendee is given the right, still because of the said fact it cannot be said that the present plaintiff is also given the said right. In this regard I would prefer to disagree with the learned District Judge plainly due to the reason that he has overlooked to the fact that the sale deed in respect of the property located in Survey No.154 which is adjacent to one plaintiff's property at C.T.S. No.153. Defendant's property is located in C.T.S. No. 155 is

in the Western corner and towards Eastern side there is open space. The sketch annexed to the plaint shows the open lane by letters A, B & G. This aspect apart, the recitals of the sale deed shows that lane of the width of 5 feet was left for the use of all the concerned parties. The four boundaries of the said open common lane were also mentioned in the said sale deed and, therefore, I do not see any reason why this piece of evidence should be discarded only because the defendant is not party to to the suit especially when present property holder of C.T.S. No. 154 is examined as a witness on behalf of the plaintiff who has brought on record the present sale deed. Therefore, in my considered view, existence of the said recital in sale deed Exh.59 is one of the clinching pieces of evidence in favour of the plaintiff to show that indeed there existed 5 feet width open lane for the use of all the concerned parties including the plaintiff as well as the owner of adjacent properties Survey No.154.

7 In this regard, reference was being made to the provision of Sec. 4 of the Indian Easement Act, 1882, which runs as under :-

> **"Sec.4. "Easement" defined**.- An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own.
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> **Dominant and servient heritages and owners.:**- The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner, the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation.:- In the first and second clauses of this section, the expression “land” includes also things permanently attached to the earth; the expression “beneficial enjoyment” includes also possible convenience, remote advantage, and even a mere amenity; and the expression “to do something” includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon.”

8 The illustrations (a) & (b) of the said section leave no doubt whatsoever that the right involved of the plaintiff in the said property is vested upon the plaintiff by virtue of the said provision and, therefore, I have no doubt whatsoever that the plaintiff has proved his easementary right as alleged. I am also satisfied that the learned District Judge has committed an error while rejecting all important evidence of sale deed Exh.59 which prompted him to observe that there was no documentary evidence in support of the plaintiff's claim. The correct position revealed from the record is quite otherwise. In the result, I am inclined to allow the appeal.

Hence, the second appeal is allowed with no order as to costs. The judgment and order passed by the learned District Judge, Sangli dated 4.11.1987 is hereby set aside and the order passed by the Civil Judge, Jath, dated 29.9.1981 in Civil Suit No. 70 of 1975 stands restored and confirmed.

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